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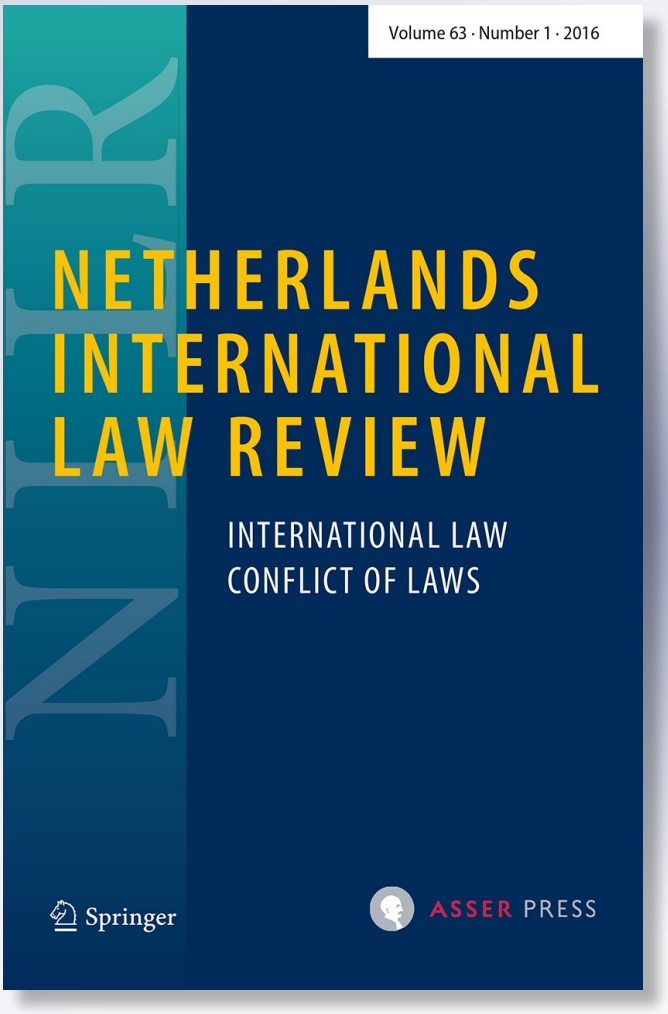
Netherlands International Law Review
International Law, Conflict of Laws

ISSN 0165-070X
Volume 63
Number 1

Neth Int Law Rev (2016) 63:23-49
DOI 10.1007/s40802-016-0055-0



Springer

Neth Int Law Rev (2016) 63:23–49
DOI 10.1007/s40802-016-0055-0

ARTICLE

General Principles of Public Order and Morality and the Domain Name System: Whither Public International Law?

Adamantia Rachovitsa[1]

Published online: 14 April 2016

Abstract This article discusses the dispute settlement procedure set up by the Internet Corporation for Assigned Names and Numbers to assess whether applied-for generic top-level domain names (gTLDs) are contrary to accepted legal norms of morality and public order that are recognised under general principles of international law. The standard of general principles of international law for morality and public order exemplifies the introduction of a legal yardstick to assess gTLDs. First, the article argues that this standard was carefully crafted to fulfil, in theory, the goals of the settlement procedure. In practice, however, it is unclear whether such general principles are apt to articulate, in a legal form, the norms of public order and morality. Second, the article demonstrates that the expert panels adopted different approaches in deciding the cases brought before them either by prioritising the protection of the users' health online over freedom of expression or by focusing on preserving freedom of expression under the human rights paradigm. The expert panels construed their mandates differently and implicitly applied different concepts and bodies of public international law into their framing of a new area of regulation. The analysis underlines that one should be cautious when conceptualising and balancing competing interests in the domain name space, such as, on the one hand, the availability of information online and economic considerations and, on the other, the accommodation of public interest concerns in the Internet's root zone. The article concludes by emphasising that international law is not a panacea for highly debatable policy issues in Internet governance.

Keywords Internet · ICANN · Generic top-level domain names · gTLD · Limited public interest objection · Freedom of expression · General principles of international law · Public order · Morality

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1 Introduction

Internet governance has been developed in the realm of informality. Novel structures, significant institutions, arrangements and private regulation have flourished to manage and ultimately define fundamental facets of the Internet's functioning. Informality renders these modes of governance, in principle, invisible, and—potentially—irrelevant, in the eyes of the public international lawyer. There is, however, an ongoing academic and policy discussion on attuning aspects of Internet governance with the requirements of legal formality, including public international law.[1]

This article discusses the relevance and application of international legal standards to the domain name system (DNS). The analysis is couched within the context of the development of new generic top-level domains (gTLDs). The DNS is an essential component of most Internet services' functionality. It serves the role of the Internet's primary directory by mapping Internet protocol addresses to respective domain names.[2] The system essentially translates domain names into numerical addresses thereby enhancing, in this way, the usability of the network since Internet users type names instead of numbers. The DNS is organised hierarchically. At the first-level set of domain names are the top-level domains (TLDs), including the core gTLDs names (for example, .org, .com, .net, .edu, .int) and the country code top-level domain names (for example, .us, .uk, .cn).[3] Below these TLDs are the second and third-level domain names, which are known to the average Internet user as websites. Currently, the management of the DNS and the registration of new domain names fall within the remit of the Internet Corporation for Assigned Names and Numbers (ICANN), a non-profit, self-regulatory body whose mission is to ensure a stable and unified global domain namespace.

In 2012, following a long policy-development process, ICANN expanded the gTLDs by inviting applications for the creation of new domain names and respective strings (for example, .CARS, .HEALTH). The new gTLDs are expected to transform the way Internet users experience and use the web. Any Applicant, who can substantiate their technical, operational and financial capacity to operate a gTLD string and successfully completes the application process, can run the registry of the new string.[4] The program aims at fostering competition, consumer choice and promoting innovation and bottom-up coordination.[5] ICANN's decisions have a global impact on a much wider constituency than potential gTLD Applicants. ICANN manages the Internet as a universal resource and its choices define the essential backbone of the network as well as the information that is available to Internet users globally.

The development of a new domain namespace raises certain questions. For example, are .SEX or .GUN generic strings that would/should be universally

[1] E.g., Brandshaw et al. (2015), p. 5; Pauwelyn et al. (2012); Klabbers (2011).

[2] Wilson (2009), p. 319.

[3] Post (2009), pp. 142–162.

[4] Lipton and Wong (2012); Partridge and Arnot (2011–2012).

[5] Easton (2012), p. 274.

accepted online? Do private entities running domain names have specific obligations and, in turn, should Internet users have any expectations from them? If such obligations and/or expectations exist, does it make any difference whether an entity manages .CARS or .HEALTH? In order to assess whether there are any reasons for excluding the registration of an applied-for string, ICANN provides the opportunity for third parties to submit an objection. A dispute resolution procedure has been put in place and expert panels hear and decide formal objections which may be filed on one of the following four grounds: (a) string confusion objection; (b) legal rights objection; (c) community objection; and (d) limited public interest (LPI) objection.

This article focuses on the LPI objection, according to which the applied-for gTLD string will not be registered, if it is found to be contrary to generally accepted legal norms of morality and public order that are recognised under principles of international law.[6] The LPI objection is significant for two reasons. First, an international legal standard has been put in place to evaluate the applied-for strings. Second, the LPI objection purports to protect serious public interests of Internet users on a global level whereas other grounds to object merely concern the protection of private interests (for example, legal rights stemming from a trademark) and/or of specific communities.

The article first argues that ICANN undertook via the LPI objection to regulate aspects of the domain namespace by reference to public international law. The standard of general principles of international law for morality and public order exemplifies the introduction and application of a legal yardstick to assess the registrability of gTLDs.[7] This standard was carefully crafted to fulfil, in theory, the goal of the LPI objection to protect public interest considerations on the DNS level. Nonetheless, in practice, this standard is ambiguous and vague. The analysis demonstrates that 'general principles of international law for morality and public order' is a hybrid international legal standard, which includes, but is not necessarily limited to, general principles of law recognised by civilised nations, under Article 38(1)(c) International Court of Justice (ICJ) Statute. Moreover, the expert panels' determinations which have been published, thus far, reveal disagreements on the requirements for a norm of morality and public order to qualify as a general principle.

Second, the article argues that the expert panels adopted different approaches in deciding the cases brought before them. Certain Panels prioritised the protection of social concerns, such as the protection of the users' health online, over freedom of expression. One Panel coming from a different starting point embedded the objection under the human rights paradigm and focused on the importance of preserving freedom of expression, as entrenched in the function of the gTLDs. Finally, other panels decided on the objections without touching upon the specific features of the DNS. These divergences arise from the fact that the expert panels

[6] Art. 3.2.1 gTLD Applicant Guidebook, ICANN (4 June 2012) p. 3.4, http://newgtlds.icann.org/en/applicants/agb. Accessed 1 March 2016 (AGB).

[7] For similar thoughts Post (2009), p. 160 discussing the Uniform Domain Name Dispute Resolution Policy.

construed their mandates differently. Also, the panels seem to read and implicitly apply different concepts and bodies of public international law into their framing of a new area of regulation. The analysis underlines that one should be cautious when conceptualising and balancing competing interests in the domain name space, such as, on the one hand, the availability of information online and economic interests and, on the other, the accommodation of public interest concerns in the Internet's root zone.

The discussion is arranged into four sections. Section 2 gives an overview of the LPI procedure and the objections that have already been filed. Section 3 discusses how the standard of general principles of international law for public order and morality was crafted and whether it sits well with the intentions of the drafters and the goals of the dispute settlement procedure. Sections 4 turns to assess how the expert panels construed general principles for public order and morality and demonstrates that the panels departed in their reasoning and findings. Finally, Sect. 5 argues that the panels decided the objections by prioritising different interests. The analysis concludes that reference to general principles of international law should not be seen as a panacea to highly debatable policy issues in Internet governance.

2 Overview of the Limited Public Interest Objection

The LPI objection was created in order for public interest considerations to be duly appreciated and taken into consideration when registering new gTLDs. This means that gTLD strings should not raise morality and public order issues. The main concerns that ICANN had in mind when drafting the LPI objection pertained to (1) incitement to, or promotion of, violent lawless action; (2) incitement to, or promotion of, discrimination based upon race, colour, gender, ethnicity, religion or national origin; or (3) incitement to, or promotion of, child pornography or other sexual abuse of children.[8] The onus of the objection procedure focuses on whether the applied-for gTLD string *itself* is contrary to general principles of international law for morality and public order. If needed, however, the Panel in its determination may use as additional context the intended purpose of the gTLD as stated in the application for the string. This seems to exclude, in principle, any assessment of the (future) content of the string.[9]

ICANN appointed the International Centre of Expertise of the International Chamber of Commerce (ICC) as the Dispute Resolution Service Provider to administer disputes brought pursuant to the LPI procedure.[10] The Expert Panel is constituted by Experts recognised as 'eminent jurists of international reputation, with expertise in relevant fields as appropriate'.[11] Crucially, and in contrast to the

[8] New gTLD Program Explanatory Memorandum, 'Standards for Morality and Public Order Research' (30 May 2009), https://archive.icann.org/en/topics/new-gtlds/morality-public-order-30may09-en.pdf. Accessed 1 March 2016.

[9] For a further discussion on this see Sect. 5.1.

[10] Art. 3.2.3, p. 3.9 AGB.

[11] Art. 3.4.4, p. 3.16 and Art. 13(b)(iii), p. 8 AGB.

String Confusion and Community objections for which only one Expert is required, the LPI and the Existing Legal Rights objections require three Panellists. This indicates that it was anticipated that the LPI objections would involve difficult legal questions. In the case of the LPI objection the necessary qualifications and expertise of the experts are not as straightforward as in the other objections.[12] In practice, panellists are proposed and appointed by the ICC in accordance with the ICC rules of expertise.[13] The panels that have been constituted thus far have included at least one public international lawyer (who is both a senior academic and a practitioner) and other experts in international dispute settlement, international commercial arbitration and intellectual property (academics and/or practitioners).[14]

As far as the standing to object is concerned, anyone may file an LPI objection. Due to this inclusive standing base objectors are subject to a 'quick look' procedure designed to identify and eliminate frivolous and/or abusive objections.[15] The independent objector may also file objections against highly objectionable gTLD applications. The independent objector, appointed by ICANN, is charged with protecting the public interest in the course of creating new gTLDs. The independent objector does not act on behalf of any persons or entities, but acts solely in the best interests of the public who use the global Internet.[16] In light of the public interest goal, the Independent Objector shall not object to an application unless at least one comment in opposition to the application is made in the public sphere.[17] Professor Allain Pellet, an eminent public international lawyer, was appointed and served as the independent objector from 2012 to 2015.

A basic tenet of the dispute resolution procedure is to resolve the disputes quickly and at a low cost. For this reason, procedures for the production of documents are limited and a Panel may require a party to produce additional evidence only in exceptional circumstances. Disputes are usually resolved without an in-person hearing.[18] The findings of the Panel are not legally binding but are considered an expert determination and advice that ICANN accepts.[19] The applicant and the objector do not have any other remedies to pursue but the success or dismissal of the objection.[20]

[12] *Professor Alain Pellet, Independent Objector (France) v. Afilias Limited (Ireland)*, Case No. EXP/409/ICANN/26, Expert Determination of 6 November 2013 (Prof. George A. Bermann (Chair); Prof. Attila Massimiliano EnricoTanzi (co-expert); Mr Erik G.W. Schäfer (co-expert)), para. 59.

[13] According to Sect. II, Art. 3(1) 'any proposal of an expert by the Centre shall be made by the Centre either through an ICC national committee or otherwise. The Centre's role normally ends on notification of the proposal unless the Centre is asked to appoint the proposed expert and/or administer the procedure pursuant to Sections III and IV'. Further, Sect. III, Art. 7(1) indicates that 'any appointment of an expert by the Centre shall be made by the Centre either through an ICC national committee or otherwise'. http://www.iccwbo.org/products-and-services/arbitration-and-adr/icann-new-gtld-dispute-resolution/. Accessed 1 March 2016.

[14] For details of the Panellists appointed by the ICC see nn. 23, 26, 32, 73 below.

[15] Art. 3.2.2.3, p. 3.6 AGB.

[16] Art. 3.2.5, p. 3.9 AGB.

[17] Art. 3.2.5, p. 3.10 AGB.

[18] Art. 3.4.5, p. 3.16 AGB.

[19] Art. 3.4.6, p. 3.17 AGB.

[20] Art. 21(d), p. P-11 AGB.

As of 29 December 2015 twenty-three objections have been filed against applied-for strings thereby triggering the LPI procedure.[21] The strings under review were .BROKER, .HEALTH and a series of health-related strings (.HEALTHCARE, .HOSPITAL, .MED). The independent objector filed ten objections and the remaining thirteen were submitted by other private entities. The expert panels heard ten objections as the remainder had been withdrawn.[22] Only in one instance did the Objector prevail and the Panel found that the string should not be registered (.HOSPITAL).[23] The number of objections filed and finally heard thus far may appear to be low, but one should keep in mind that public order and morality concerns were discussed in other instances too via the Community objection.[24] The determinations published concerned health-related strings (with the exception of the string .BROKER) and, consequently, the parties' arguments and the respective analysis revolved around the right to health. For this reason, the present discussion inevitably focuses on the questions raised by the health-related strings. Nonetheless, the analysis and the conclusions drawn apply to any type of string under review. The main question brought before the panels was whether the applied-for strings were contrary to general principles of international law on public order and morality. More specifically, the independent objector argued that the applied-for string taken together with its intended purpose was contrary to general principles. According to his view, the applicants treated health merely as another commodity whereas health is recognised under international law as a fundamental human right with a

[21] According to the information available at https://newgtlds.icann.org/en/program-status/odr/determination. Accessed 1 March 2016.

[22] *Independent Objector v. DotHealth Limited*, Application I.D. 1-11783236 regarding '.HEALTH'; *Charles Schwab & Co., Inc. v. IG Group Holdings PLC (UK)*, Application I.D. 1-1332-82635 regarding '.BROKER'; *TD Ameritrade v. Fidelity Brokerage Services LLC*, Application I.D. 1-8453627 regarding '.IRA'; *Charles Schwab & Co., Inc. v. Fidelity Brokerage Services LLC*, Application I.D. 1-8453627 regarding '.IRA'; *Teachers Insurance and Annuity Association of America v. Fidelity Brokerage Services LLC*, Application I.D. 1-8453627 regarding '.IRA'; *Prudential Financial Inc. v. Fidelity Brokerage Services LLC*, Application I.D. 1-1845-68316 regarding '.MUTUALFUNDS'; *TD Ameritrade v. Fidelity Brokerage Services LLC*, Application I.D. 1-1845-68316 regarding '.MUTUALFUNDS'; *Charles Schwab & Co., Inc. v. Fidelity Brokerage Services LLC*, Application I.D. 1-1845-68316 regarding '.MUTUALFUNDS'; *Teachers Insurance and Annuity Association of America v. Fidelity Brokerage Services LLC*, Application I.D. 1-1845-68316 regarding '.MUTUALFUNDS'; *Prudential Financial Inc. v. Fidelity Brokerage Services LLC*, Application I.D. 1-1845-17694 regarding '.RETIREMENT'; *TD Ameritrade v. Fidelity Brokerage Services LLC*, Application I.D. 1-1845-17694 regarding '.RETIREMENT'; *Teachers Insurance and Annuity Association of America v. Fidelity Brokerage Services LLC*, Application I.D. 1-1845-17694 regarding '.RETIREMENT'; *Charles Schwab & Co., Inc. v. Fidelity Brokerage Services LLC*, Application I.D. 1-1845-17694 regarding '.RETIREMENT'.

[23] *Professor Alain Pellet, Independent Objector (France) v. Ruby Pike, LLC (USA)*, Case No. EXP/412/ICANN/29, Expert Determination of 11 December 2013 (Mr. Piotr Nowaczyk (Chair); Prof. August Reinisch (co-expert); Mr. Ike Ehiribe (co-expert)).

[24] Pursuant to Arts. 3.2.2.4 and 3.5.4 the Community objection concerns whether there is substantial opposition from a significant portion of the community to which the string may be targeted. E.g. *Independent Objector v. Charleston Road Registry Inc*., Application ID 1-1139-2965 regarding '.MED'; *ICANN At-Large Advisory Committee (ALAC) v. DotHealth LLC*, Application ID 1-1684-6394 regarding '.HEALTH'. See also the new gTLD Program Explanatory Memorandum, '"Limited Public Interest" Objection (Morality and Public Order objection)' (12 November 2010) pp. 9–10, https://archive.icann.org/en/topics/new-gtlds/explanatory-memo-morality-public-order-12nov10-en.pdf. Accessed 1 March 2016.

corresponding obligation to respect, protect and fulfil. The independent objector further claimed that any entity seeking to operate a health-related gTLD registry is under the obligation to provide access to health and, by extension, access to reliable and trustworthy health-related information to Internet users.

3 Crafting the Standard of 'General Principles of International Law for Morality and Public Order'

This section shows that the standard of general principles of international law for morality and public order (the AGB standard) serves well the interests of the drafters of the dispute resolution mechanism set up for the evaluation of the applied-for gTLDs. The discussion first explains why an *international* legal standard was favoured and makes a preliminary assessment of its scope. ICANN crafted the AGB standard to be ambiguous so as to afford discretion to the expert panels to decide the objections brought before them. The analysis argues that the AGB standard introduces a hybrid international legal standard and clarifies the concept of 'general principles of international law for morality and public order' so as to include both general principles of law recognised by civilised nations (under Article 38(1)(c) ICJ Statute) and other internationally recognised general principles of international law on morality and public order.

3.1 The Need for an *International* Legal Standard and Its Scope

ICANN created a standard that could be used as a legal yardstick to evaluate the merits of an LPI objection in the context of a dispute resolution mechanism. It is clear that ICANN intended to establish an *international* legal standard. The reason underpinning this choice is that an international standard for public order and morality excludes diverse and controversial interests or concerns under domestic law. The AGB states that national laws are not a valid ground for an LPI objection.[25] This was reaffirmed by the Expert Panel in the *Ameritrade v. IG Group Holdings PLC* case. In this instance, the Objector by referring to national and supranational legislation argued that .BROKER is an objectionable string. The Panel held that if the invoked legislation is not based on general principles of international law, then there is no ground to object to the string.[26] Hence, the standard of general principles of international law for morality and public order primarily is to be ascertained by taking international instruments into account. National laws are not rendered completely irrelevant as long as the Objector furnishes a meaningful link to principles of international law.

The Explanatory Memoranda shed some light on the preparatory work when drafting the LPI objection. ICANN consulted international law experts, practitioners

[25] P. 3.18 AGB.

[26] *TD Ameritrade (USA) v. IG Group Holdings PLC (UK)*, Case No. EXP/458/ICANN/75, Expert Determination of 11 December 2013 (Prof. Cees van Dam (Chair); Prof. Jan Kleinheisterkamp (co-expert); Mr Assen Zahariev Alexiev (co-expert)), para. 90.

and judges in order to create an international standard conducive to accommodating morality and public order norms.[27] Notwithstanding the uncertainty concerning universally accepted norms on morality and public order, the starting point was peremptory norms, including the prohibition of the use of force, the prohibition of genocide, the principle of racial non-discrimination, and the rules prohibiting crimes against humanity, piracy and trade in slaves.[28] The final formulation of the standard, however, has a broader scope encompassing additional grounds for objecting a string. Article 3.5.3 of the AGB provides the specific grounds upon which an applied-for string is contrary to generally accepted legal norms relating to morality and public order that are recognised under principles of international law. These grounds are:

(a) incitement to, or promotion of, violent lawless action;
(b) incitement to, or promotion of, discrimination based upon race, colour, gender, ethnicity, religion or national origin, or other similar types of discrimination that violate generally accepted legal norms recognised under principles of international law;
(c) incitement to, or promotion of, child pornography or other sexual abuse of children; or
(d) a determination that an applied-for gTLD string would be contrary to specific principles of international law as reflected in relevant international instruments of law.

Despite the fact that these grounds are exhaustively stipulated, their precise scope calls for further discussion. Grounds (a) to (c) are confined to incitement to, or promotion of, violent lawless action, discrimination and child pornography or other sexual abuse of children. Ground (d), however, provides that a string can be objected to on the basis of being contrary to specific principles of international law as reflected in relevant international instruments of law. This means that there can be reasons other than the ones prescribed in grounds (a) to (c) that can substantiate the LPI objection.[29] In a series of objections brought by the Independent Objector regarding the right to health, the Respondents invoked the *ejusdem generis* principle arguing that Article 3.5.3 has to be interpreted as envisaging a homogenous class of grounds and, thus, the right to health could not be read in the prescribed grounds. Nevertheless, the panels found that ground (d) opens up the scope of the LPI objection as long as the Applicant can substantiate that a specific norm of public order and morality is indeed a general principle of international law.[30] Professor Reinisch, in his dissenting Opinion attached to the Expert determination in the *Ruby*

[27] New gTLD Program Explanatory Memorandum, 'Morality and Public Order Objection Considerations in New gTLDs' (29 October 2008) p. 3, http://archive.icann.org/en/topics/new-gtlds/morality-public-order-draft-29oct08-en.pdf. Accessed 1 March 2016.

[28] Ibid., p. 2.

[29] *Ameritrade* case, *supra* n. 26, para. 90.

[30] E.g. *Professor Alain Pellet, Independent Objector (France) v. Medistry, LLC (USA)*, Case No. EXP/414/ICANN/31, Expert Determination of 19 December 2013 (Prof. Fabien Gélinas (Chair); Mr John Gaffney (co-expert); Prof. Guglielmo Verdirame (co-expert)), paras. 98–102. See Vezzani (2014), p. 321.

Pike case, elaborated on the threshold required for a string to be objectionable. Reinisch disagreed with the other members of the Panel who found that .HOSPITAL was contrary to the right to health recognised as a general principle. In his view, the AGB evidences that 'only a very limited set of particularly reprehensible behaviour is objectionable'[31] and, hence, the threshold for substantiating general principles of public order and morality is set high. The expert panels in the *Silver Glen*, *Goose Fest* and *Dothealth* cases shared the same position.[32]

Therefore, even though ground (d) opens up the scope of the objection, one should not lose sight of the fact that the grounds to object to an applied-for string should be construed narrowly. The underlying reason that the LPI was drafted in such a way in the first place is the following: if a string is found to be objectionable, this effectively qualifies as a limitation to the freedom of expression on the DNS level. Article 3.5.3 of the AGB underscores that 'under these principles, everyone has the right to freedom of expression, but the exercise of this right carries with it special duties and responsibilities. Accordingly, certain limited restrictions may apply'. Domain names are an important way to find and access information online and, thus, have an expressive function.[33] In fact, the role of the DNS is critical in defining what information will be available on the backbone of the Internet. National courts have also recognised domain names as a means of expression that must be protected under the freedom of speech.[34] The prohibition of the use of certain words or characters in domain name strings is effectively a form of censorship, which is imposed by a private entity (ICANN). For this reason, since limitations to freedom of expression need to be interpreted narrowly, so do the grounds to object to the strings.

[31] Dissenting Opinion by Professor August Reinisch relating to the Expert Determination of 11 December 2013 in the *Ruby Pike* case (12 December 2013), *supra* n. 23, para. 18.

[32] *Professor Alain Pellet, Independent Objector (France) v. Silver Glen, LLC (USA)*, Case No. EXP/411/ICANN/28, Expert Determination of 26 November 2013 (Prof. James Crawford (Chair); Prof. Maria Gavouneli (co-expert); Mr James Bridgeman (co-expert)), para. 33; *Professor Alain Pellet, Independent Objector (France) v. Goose Fest, LLC (USA)*, Case No. EXP/417/ICANN/34, Expert Determination of 16 December 2013 (Dr Stanimir A. Alexandrov (Chair); Dr Maxi C. Scherer (co-expert); Prof. Frédéric Bachand (co-expert)), para. 94; *Professor Alain Pellet, Independent Objector (France) v. Dothealth, LLC (USA)*, Case No. EXP/416/ICANN/33, Expert Determination of 16 December 2013 (Dr Stanimir A. Alexandrov (Chair); Dr Maxi C. Scherer (co-expert); Prof. Frédéric Bachand (co-expert)), para. 91.

[33] Council of Europe, Directorate General Human Rights and Rule of Law, 'Comments Relating to Freedom of Expression and Freedom of Association with Regard to New Generic Top Level Domains' (by W. Benedek, J. Liddicoat, N. van Eijk) DG-I (2012) 4 (12 October 2012) p. 6; Council of Europe, Declaration by the Committee of Ministers on the Protection of Freedom of Expression and Information and Freedom of Assembly and Association with regard to Internet Domain Names and Name Strings (21 September 2011) para. 7, https://wcd.coe.int/ViewDoc.jsp?id=1835805&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383. Accessed 1 March 2016.

[34] 'Comments Relating to Freedom of Expression and Freedom of Association with Regard to New Generic Top Level Domains', *supra* n. 33, pp. 6–7; Council of Europe, 'ICANN's Procedures and Policies in the Light of Human Rights, Fundamental Freedoms and Democratic Values' (by M. Zalnieriute, T. Schneider) DGI (2014) pp. 12, 14.

3.2 The Ambiguity of 'General Principles of International Law for Public Order and Morality'

It is not clear whether Article 3.5.3 AGB mirrors Article 38(1)(c) ICJ Statute regarding general principles of law recognised by civilised nations. The AGB refers to both 'generally accepted legal norms of morality and public order that are recognised under principles of international law'[35] and 'general principles of international law for morality and public order'.[36] The expert panels did not clarify this point either. It is argued herein that the AGB standard includes, but it is not necessarily limited to, Article 38(1)(c) ICJ Statute. If the drafters wished to refer only to general principles of law recognised by civilised nations, they would have stated so. The fact that international lawyers and practitioners had been involved in the preparatory work demonstrates that the drafters were well aware of their options. Furthermore, a recurring concern during the drafting process was to afford broad discretion to the Panellists to consider and apply general principles.[37] Consequently, the AGB standard concerns general principles of law, as a source of public international law, as well as other pertinent, internationally recognised general principles of public order and morality.

With regard to general principles of law (under Article 38(1)(c) ICJ Statute) the choice to include them as the legal standard against the background of which a string will be assessed may seem to be, at first sight, atypical. While there have been judicial mentions of certain general principles, it seems that neither the ICJ nor its predecessor have decided a case by relying on these general principles.[38] Similarly, in the area of international commercial arbitration relatively few awards have been published in which a tribunal has actually applied general principles of law, let alone decided a case solely on this basis.[39] International judicial and arbitral practice suggests that general principles of law are mostly used as a means to interpret and apply treaties and customary international law. General principles are usually thought of in terms of having a complementary nature or function toward treaties and custom[40]; their role is confined to providing a 'fall-back' source in the event that no treaty or customary rule applies to a given case.[41] There is no unanimity either over the legal nature of general principles of law as a source of international law. Some writers consider that the expression refers mainly to principles of international law and only exceptionally to principles derived from domestic law, whereas other authors hold the view that the provision points to principles recognised in various domestic legal systems.[42] The comparative law

[35] P. 3.4 AGB.

[36] P. 3.21 AGB.

[37] 2009 gTLD Explanatory Memorandum, *supra* n. 8, pp. 3–5.

[38] With the exception of the controversial question of the binding effect of provisional measures. See Thirlway (2014), pp. 104–105; Pellet (2012), p. 833.

[39] Berger (2011).

[40] Corten (2009), p. 187.

[41] Thirlway (2014), p. 109.

[42] Cheng (2006), pp. 2–5; Pellet (2012), pp. 833–835; Pauwelyn (2003), pp. 124–127.

methodology followed to ascertain the existence and content of a general principle also brings difficulties to the fore.[43]

Despite the ambiguity surrounding the function, nature and content of general principles of law, they are, in theory, an apt choice for the LPI objection. This is for two reasons. First, general principles of law are inherently broad and open-textured leaving ample room for specification by other norms and rules of international law.[44] Their function as law-creating arguments[45] turns them into an inexhaustible reservoir for international bodies and courts.[46] General principles have paved the way for the construction of new *corpora juris* in areas of international affairs that called for regulation, such as reparation in State responsibility, the law of outer space or environmental law, to name but a few.[47] It has also been suggested that general principles of law are the appropriate vehicle for mainstreaming human rights into general international law.[48] Interestingly for the present discussion, general principles of law arguably 'leave the door open to new actors as well as new types of processes and outputs'.[49]

Second, general principles of law are the most receptive source of positive public international law to moral influences.[50] They give legal form to value and extralegal concerns[51] or even justify an appeal to ethical concepts,[52] while still being subject to State consent.[53] In order for moral or value considerations to be mainstreamed through general principles, they have to be given a sufficient expression in legal form so that the legal system preserves its certainty and predictability.[54] The AGB offers guidance on established legal forms encapsulating public order and moral considerations by providing a non-exhaustive list of instruments reflecting general principles of international law. With regard to peremptory norms of international law, such instruments include the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment[55]; the Slavery Convention[56]; and

[43] Ellis (2011), p. 950; Buergenthal (2007), p. 113.

[44] Pauwelyn (2003), pp. 128–129.

[45] Kolb (2006), p. 7.

[46] McNair (1957), p. 6; Pauwelyn (2003), pp. 130–131; Crawford (2012), p. 35.

[47] Separate Opinion of Judge Cançado Trindade in *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010, ICJ Reports 2010, p. 14 at p. 151.

[48] Meron (1989), pp. 88–89; Simma and Alston (1988–1989).

[49] Pauwelyn et al. (2012), pp. 530–531.

[50] Wouters and Ryngaert (2009), pp. 127–128; Simma and Paulus (1999), p. 316.

[51] Kolb (2006), p. 7.

[52] Dissenting Opinion of Judge Tanaka in *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)* Second Phase, Judgment of 18 July 1966, ICJ Reports 1966, p. 6 at pp. 294–301.

[53] Crawford (2012), p. 34; Simma and Alston (1988–1989), p. 105.

[54] Pellet (2012), p. 835; Kolb (2006), p. 29.

[55] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987), 1465 UNTS 85.

[56] Convention to Supress the Slave Trade and Slavery (adopted 25 September 1926, entered into force 9 March 1927), 60 LNTS 254.

the Convention on the Prevention and Punishment of the Crime of Genocide.[57] The list further refers to instruments concerning discrimination, such as the Convention on the Elimination of All Forms of Discrimination Against Women[58]; the International Convention on the Elimination of All Forms of Racial Discrimination[59]; and the Declaration on the Elimination of Violence against Women.[60] The Universal Declaration of Human Rights[61]; the International Covenant on Civil and Political Rights[62]; the International Covenant on Economic, Social, and Cultural Rights[63]; the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families[64]; and the Convention on the Rights of the Child[65] are also mentioned.

Another set of internationally recognised general principles that the AGB drafters might have in mind is international public policy principles that are used in international commercial and investment arbitration. It is no accident that ICANN chose the International Chamber of Commerce as the dispute resolution provider to host the gTLDs expert panels and that many of the Panellists come from an international commercial background. The objection against a gTLD string is reminiscent of an international commercial arbitration (also investment arbitration) in certain respects. The creation of a string by signing a contract between ICANN and the Applicant has a resemblance to a contractual relationship under review in a commercial (or investment) arbitration. Moreover, in commercial and investment contracts the parties mutually agree upon the law to be applied and, in most cases, they acknowledge certain limits to their contractual freedom by conditioning the applicable law to rules of national, transnational or international public policy. In a similar vein, the LPI objection serves the role of introducing certain restrictions to the contractual freedom of creating a new gTLD. International public policy principles that are used in commercial and investment arbitration revolve precisely around morality and public order concerns, such as the prohibition of slavery, piracy and genocide, the drug trade, terrorism, the protection of basic principles of human rights (for example, denial of justice, due process, discriminatory taking of property)

[57] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951), 78 UNTS 277.

[58] Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981), 1249 UNTS 13.

[59] International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969), 660 UNTS 195.

[60] Declaration on the Elimination of Violence against Women UN General Assembly Resolution (adopted 20 December 1993), UN Doc. A/RES/48/104.

[61] Universal Declaration of Human Rights (adopted 10 December 1948), UNGA Res. 217 A (III) (UDHR).

[62] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976), 999 UNTS 171 (ICCPR).

[63] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976), 993 UNTS 3 (ICESCR).

[64] International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003), 2220 UNTS 3.

[65] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990), 1577 UNTS 3.

and *bonos mores* (for example, corruption).[66] Although there are striking similarities between the international public policy rules in the context of international commercial arbitration and general principles of law recognised by civilised nations, the two sets of principles are not necessarily identical. Thus, it is reasonable to sustain that the AGB standard includes these principles and concerns, too, as long as they are internationally recognised general principles.

To sum up, the standard of general principles of international law for public order and morality sits well with the intention of the drafters of the LPI objection. The content of the standard has been left ambiguous pointing to both Article 38(1)(c) ICJ Statute and other internationally recognised general principles. The standard also appears to be conducive, in theory, to articulating norms of public order and morality and, therefore, global public interest considerations in the DNS. At the same time, however, the AGB indicates that the scope of the grounds to object to a string must be construed narrowly and that only a very limited set of particularly reprehensible applied-for strings will be objectionable. The AGB specifically highlights that any grounds for limiting the freedom of expression that are not shared by the majority of the States are not likely to be general principles of international law. Such controversial grounds include blasphemy, sedition and subversive propaganda, libel laws and antitrust legislation.[67] These grounds are highly contentious in international law and there is no consensus on a regional,[68] let alone universal, basis.[69] It remains to be seen whether general principles can indeed encapsulate, in practice, public order and morality global norms.

4 Divergences on the Existence and Content of General Principles of International Law for Morality and Public Order

The previous section underlined that the standard of 'general principles of international law for morality and public order' is not self-explanatory. The AGB provides some guidance on the specific grounds to object to applied-for strings and the international instruments that reflect such general principles. Yet difficulties in clarifying the content of such general principles remain.[70] This section demonstrates that ascertaining the existence and content of general principles of international law on public order and morality does not escape the typical challenges encountered when discussing the international quality and content of general principles of law (under Article 38(1)(c) ICJ Statute). In the context of the LPI objection procedure, two main public international law questions were brought before the expert panels. First, is the right to health a general principle of international law for public order and morality? Second, if the answer to the previous question is in the affirmative,

[66] Gaillard and Savage (1999), pp. 861–863; Caron and Caplan (2013), pp. 115–117; Schreuer (2001), pp. 568–569, 586–590, 641; McNair (1957), p. 9.

[67] 2009 gTLD Explanatory Memorandum, *supra* n. 8, pp. 9–10.

[68] Harris et al. (2009), p. 477.

[69] Smith (2012), pp. 309–310.

[70] *Silver Glen* case, *supra* n. 32, para. 33.

what is the substantive content of this principle? The panels reached different conclusions.

4.1 Is the Right to Health a General Principle of International Law on Public Order and Morality?

The expert panels held different views regarding the existence of a general principle on the right to health. On the one hand, three panels evaded pronouncing on the question altogether. The Panel in the *Afilias* case regarding the .HEALTH string did not consider it necessary to decide on the existence of a general principle. Similarly, in the consolidated *Goose Fest* and *Dothealth* cases the Panel found that, even if it were assumed that there is a generally accepted right to health, the objections of the Applicants had to be dismissed on other grounds.[71] The Panel in the *Silver Glen* case stated that the 'right to health remains a very general one'[72] without prescribing legal obligations in light of the specific circumstances.

On the other hand, three expert panels asserted that the right to health is an established general principle.[73] They found the arguments of the Independent Objector convincing without, however, providing a solid reasoning as to how they adduced the existence of such a principle. The right to health is included as a human right in the UDHR[74] and the ICESCR.[75] Although the UDHR is widely cited and the ICESCR has been widely ratified, there is nothing to suggest that the right to health qualifies as a general principle. The Expert determinations provide no legal analysis of the right to health—or more accurately, everyone's right to the highest attainable standard of health. This right may prescribe legal obligations incumbent on the member States to the ICESCR, but it is envisaged as a standard of achievement

[71] *Goose Fest* case, *supra* n. 32, para. 103; *Dothealth* case, *supra* n. 32, para. 100.

[72] *Silver Glen* case, *supra* n. 32, para. 40.

[73] *Professor Alain Pellet, Independent Objector (France) v. Steel Hill, LLC (USA)*, Case No. EXP/413/ICANN/30, Expert Determination of 2 January 2014 (Ms. Teresa Cheng (Chair); Dr Stephan Schill (co-expert); Dr Cristoph Liebscher (co-expert)), para. 42; *Ruby Pike* case, *supra* n. 23, paras. 86–87; Consolidated objections: *Professor Alain Pellet, Independent Objector (France) v. Charleston Road Registry INC (USA)*, Case No. EXP/415/ICANN/32, Expert Determination of 19 December 2013 (Prof. Fabien Gélinas (Chair); Mr John Gaffney (co-expert); Prof. Guglielmo Verdirame (co-expert)), para. 105; *Professor Alain Pellet, Independent Objector (France) v. Hexap SAS (France)*, Case No. EXP/410/ICANN/27, Expert Determination of 19 December 2013 (Prof. Fabien Gélinas (Chair); Mr John Gaffney (co-expert); Prof. Guglielmo Verdirame (co-expert)), para. 114; *Medistry* case, *supra* n. 30, para. 110.

[74] Art. 25(1) UDHR provides that '[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control'.

[75] Art. 12 ICESCR states that '1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; (b) The improvement of all aspects of environmental and industrial hygiene; (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness'.

subject to progressive realisation, as is the case with many economic and social rights.[76]

The divergences among the panels' conclusions bring to the surface the difficulties associated with identifying the content of general principles of law. In the same vein as international judicial and arbitral practice,[77] establishing the international quality of general principles is a difficult task. This is all the more the case since the Panellists are expected to decide on the objections in a very quick fashion (within 45 days of the constitution of the Panel).[78] Notwithstanding the challenging task at hand, it is still surprising that three of the panels did not seem to make a reasonable effort to articulate how they concluded that the right to health is a settled general principle. The different views among the panels on fundamental legal questions further create uncertainty and inequality among gTLDs Applicants.

4.2 Access to Health and Health-related Information as Part of the Right to Health?

The second public international law question addressed by the Expert panels was whether access to health and health-related information is an integral part of the right to health. The panels' views were divided on this front, too. The independent objector argued that the right to health, as a general principle of international law on public order and morality, includes a series of obligations binding on both States and non-State actors. In particular, an entity seeking to operate a health-related gTLD registry must demonstrate an awareness of its duty to set up and manage the gTLD in such a way that the right to health is fully respected. The gTLD registry should consider health-related public interest concerns and ensure that the gTLD's operation is concordant with national and international standards, including the right of Internet users to access health-related information that is reliable and trustworthy.[79] According to the independent objector, since the entities seeking to set up and run the health-related strings had not indicated such awareness, the strings were objectionable and should not be registered. Two legal issues need to be distinguished at this point. The first issue is whether the right to health imposes duties on non-State actors. The second issue is whether the right to health encompasses such detailed obligations (for either states or non-state actors), as outlined by the independent objector.

The great majority of the panels rejected the objector's arguments both on points of law and fact. They found that the materials allegedly supporting a right to access health-related information as a positive obligation under the right to health are not compelling.[80] They also held that, in light of the circumstances, it was impossible to

[76] Eide (2014), pp. 204–206, 213.

[77] Berger (2011), p. 140; Gaillard and Savage (1999), pp. 861–863.

[78] Art. 21(a), p. P-10 AGB.

[79] E.g. *Goose Fest* case, *supra* n. 32, paras. 49–51.

[80] Ibid., para. 103; *Silver Glen* case, *supra* n. 32, para. 40.

anticipate whether the future operation of a given string would inhibit access to reliable health information.[81]

By contrast, two expert panels affirmed that the right to health includes the obligation incumbent on the applicants to provide access to reliable and trustworthy health-related information.[82] It is unclear how the panels supported this finding.[83] In the first place, the Panellists in the *Ruby Pike* case relied on ICANN's Governmental Advisory Committee's (GAC) statements and early warnings underlying the duties of the registries. In the Panel's view, GAC's statements should be accorded considerable weight since GAC is a body representing the interests of governments.[84] GAC may provide advice when a string potentially affects national laws, international agreements or public policy issues. Nonetheless, the positions taken by GAC are advisory and consultative and they do not become operational unless ICANN accepts them.[85] Most importantly, the weight accorded to GAC's warnings and statements does not reflect the special features of the multistakeholder ecosystem in Internet governance and the regulation of the domain namespace. Internet governance is defined as the development and application by governments, the private sector and civil society, in their respective roles, of shared principles, norms, rules, consensus decision-making procedures,[86] and programmes that shape the evolution and use of the Internet.[87] The role and relevance of non-State stakeholders in the Internet's ecosystem are significant concerns that cannot be disregarded by simply proclaiming that States' views matter more.[88] This inevitably implicates the question of whether public international lawyers and international commercial lawyers in their capacity serving as Expert members on these panels are sufficiently aware of the particularities of Internet governance.

The panels in the *Steel Hill* and *Ruby Pike* cases further relied upon the General Comment on the right to health issued by the Committee on Economic, Social and Cultural Rights to support their conclusion that the right to health imposes on States detailed positive obligations. According to the Comment, 'States have the duty to ensure that the privatization of the health sector does not constitute a threat to the availability, accessibility, acceptability and quality of health facilities, goods and services'.[89] The Committee emphasised that the requirement of accessibility to

[81] *Silver Glen* case, *supra* n. 32, para. 41; *Goose Fest* case, *supra* n. 32, para. 103; *Dothealth* case, *supra* n. 32, para. 100; *Charleston Road* case, *supra* n. 73, para. 107; *Hexap SAS* case, *supra* n. 73, para. 116; *Medistry* case, *supra* n. 30, para. 114.

[82] *Steel Hill* case, *supra* n. 73, para. 42; *Ruby Pike* case, *supra* n. 23, paras. 86–87.

[83] Cf. Vezzani (2014), pp. 328–329.

[84] *Ruby Pike* case, *supra* n. 23, para. 83.

[85] *Silver Glen* case, *supra* n. 32, para. 51.

[86] For ICANN's Consensus Policy Development Process see Annex A to the ICANN Bylaws, https://www.icann.org/resources/pages/governance/bylaws-en/#AnnexA. Accessed 1 March 2016.

[87] Report of the Working Group on Internet Governance (Château de Bossey, June 2005), http://www.wgig.org/docs/WGIGREPORT.pdf. Accessed 1 March 2016.

[88] Benedek (2011), pp. 201, 204.

[89] UN Committee on Economic, Social and Cultural Rights, General Comment No. 14: 'The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)', UN Doc. E/C.12/2000/4 (11 August 2000), para. 35.

health facilities, goods and services includes the right to seek, receive and impart information and ideas concerning health issues.[90] Yet, the General Comment is not a binding interpretation of Article 12 ICESCR.[91] Also, the so-called informational aspect of the right to access health-related services does not indicate whether health-related information should be *reliable and trustworthy* and what this really means.[92] Likewise, the reference made to the UN Guiding Principles on Business and Human Rights[93] is deprived of any binding effect since the Guiding Principles provide for voluntary standards and not duties incumbent on businesses.

Finally, the case law of the European Court of Human Rights on access to information was also invoked. The panels, however, took the Court's pronouncements out of context. The Court indeed has a well-developed case law concerning the positive obligation under Article 8 of the European Convention on Human Rights (ECHR) (the right to family and private life) to provide access to information. The case law, though, has referred *only* to environmental information.[94] The breadth of positive obligations is, therefore, context-specific and it does not involve duties for non-State actors. In addition, the fact that the panels employed an alleged European approach to the right to access information to infer conclusions on a global level is problematic. General principles of law on public order and morality are supposed to solidify norms of a universal scope and reach. Even if it were assumed that the case law of the European Court of Human Rights was pertinent to the circumstances at hand, it would not be sufficient to establish the existence and content of a general principle of international law on morality and public order.

To summarise, the panels have drawn selectively upon materials which are not legally binding. As far as the objections brought before the panels and the respective determinations are concerned it does not appear plausible to substantiate the existence of a general principle for the right to health. Although the standard of general principles of international law for morality and public order entails a high threshold, it leaves room for flexibility. International judges and experts have the opportunity to shape or progressively develop international law.[95] This is reinforced by the fact that the AGB explicitly mentions that a Panel may also refer to other relevant rules of international law in connection with the dispute resolution standards and principles and that these principles are subject to evolution based on consultation with legal experts, and the public.[96] In the future expert panels are, therefore, welcome to evolve the scope of the standard of general principles for

[90] General Comment No. 14, para. 12.

[91] *Silver Glen* case, *supra* n. 32, para. 41.

[92] *Charleston Road* case, *supra* n. 73, para. 111; *Hexap SAS* case, *supra* n. 73, para. 120; *Medistry* case, *supra* n. 30, para. 116.

[93] Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (by John Ruggie), UN Doc. A/HRC/17/31 (21 March 2011).

[94] Harris et al. (2009), p. 447.

[95] Buergenthal (2007), p. 115.

[96] Art. 3.5, p. 3.18 AGB.

public order and morality as long as they provide persuasive reasoning in their determinations. Conversely, the contribution of other international bodies and courts will be crucial in articulating how international law could be applied to certain aspects of the domain namespace so that the panels can subsequently build upon this. The Committee on Economic, Social and Cultural Rights, for example, can elaborate on how the right to health and other rights can be practically applied and operationalised on the DNS.[97] Similarly, the Office of the High Commissioner on Human Rights,[98] the UN Special Rapporteur on the Right to Freedom of Expression[99] and the recently created mandate of the UN Special Rapporteur on the Right to Privacy[100] have already made important contributions in setting out the basic guidelines on how existing international law applies to (and may be developed regarding) the challenges of the digital environment.

5 'International Law Has Many Rooms'[101]: The Expert Panels' Different Approaches in Deciding on the Objections

Having discussed how the expert panels construed and applied the standard of general principles of international law on public order and morality, this section highlights how the panels decided on the objections brought before them. Interestingly, the panels resolved the question of the registrability of a string by reading their mandate and prioritising the competing interests at hand in entirely different ways. Besides a few panels, which decided the cases without engaging with the specific features of the DNS, the remaining panels were divided on the question of whether it is the freedom of expression or other public interests that should be the starting point of their assessment and reasoning. The different perspectives can arguably be explained, first, by the absence of clear and detailed procedure principles set out by the AGB and, second, by the fact that the Experts seem to attempt to fit existing paradigms and bodies of international law in a new area of regulation. The plurality of perspectives should be seen as an opportunity for international law to take account of its own limitations to address aspects of the DNS.[102] At the same time, international law should not be treated as a panacea that can, or should, resolve policy issues in Internet governance.

[97] Fidler (2015), pp. 106–107.

[98] Report of the Office of the United Nations High Commissioner for Human Rights, 'The Right to Privacy in the Digital Age', UN Doc. A/HRC/27/37 (30 June 2014).

[99] F. Rue, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression', UN Doc. A/HRC/23/40 (13 April 2014); D. Kaye, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression', UN Doc. A/HRC/29/32 (22 May 2015) on the use of encryption and anonymity in digital communications.

[100] 'Human Rights Council Creates Mandate of Special Rapporteur on the Right to Privacy' (26 March 2015), http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15763&LangID=E (accessed 1 March 2016).

[101] Crawford (2014), p. 140.

[102] Taubman (2009), p. 6.

5.1 'Resolving the Dispute between the Parties' Approach: The String and Its Additional Context

The question brought before the panels was whether the applied-for strings .HEALTH, .HEALTHCARE, .BROKER, .MED and .HOSPITAL were contrary to general principles of international law on public order and morality. Article 3.5.3 of the AGB states that 'the panel will conduct its analysis on the basis of the applied-for gTLD string itself. The Panel may, if needed, use as additional context the intended purpose of the TLD as stated in the application'. It is an exceptional circumstance for a string in itself to be contrary to public order or morality and the strings under discussion are not. For this reason, the Independent Objector argued instead that the strings *taken together with their additional context* are incompatible with such general principles. The additional context refers to the intended purpose of the gTLD registry as stated in its application for registering the string.

The Panel in the *Steel Hill* case followed the letter of the AGB. It stressed that whilst it may, if needed, consider the intended purpose of the gTLD, the starting point of the discussion is the string itself. The additional context becomes pertinent if the word to be used as a string does not have a clear meaning, or if the intended purpose shows beyond doubt that the applied-for string will be used for a purpose which is contrary to principles of public order and morality.[103] Similar was the position taken in the *Silver Glen*, *Goose Fest* and *Dothealth* cases.

On the other hand, the Panel in *Afilias* displaced its scope of inquiry from the string to the additional context. The examination of the string's additional context entails an assessment of how the string will be managed and, hence, what health-related information will be available under a certain domain. This is essentially an attempt to anticipate how a top-level generic name could potentially be abused in the course of its future operation.[104] Some cautiousness is advisable with this approach. First, although the panels may take into consideration the string's additional context, the primary focus lies on the string. This does not rule out an initial assessment of how the gTLD will likely operate insofar as the Panel does not lose sight of the fact that such an assessment complements the evaluation of the string. In other words, the Panel cannot displace the primary focus from the string to the string's hypothetical future operation. Taking into consideration that the string Applicants have to mention only a very few pertinent facts and commitments when they apply for the string, a definite assessment of how the domain will operate is precarious. In the absence of sufficient information the panels would have to make hypothetical exercises, or even speculate, as to how a domain name would be used and what type of information would be available. Second, the argument that if the focus is primarily on the wording of the string itself, 'very few strings would qualify as contrary to public order and morality'[105] is unpersuasive. The LPI objection is narrowly delimited in its scope and it was designed with the following in mind: few strings will be contrary to general principles of international law for public order

[103] *Steel Hill* case, *supra* n. 73, paras. 48–49.

[104] *Afilias* case, *supra* n. 12, paras. 53–54.

[105] *Afilias* case, *supra* n. 12, para. 59.

and morality. This, in turn, limits substantially the extent to which the LPI objection is conducive to protecting public interests. Third, it is doubtful whether the panels have the competence to decide on issues pertaining to the management of the string and the latter's likely (or hypothetical) subsequent effects for the Internet users. The panels are entitled to make determinations on the requirements for the registration of the string. Certain expert panels stated that it would be desirable that the Applicants set and implement specific commitments aiming at introducing safeguards for the reliability of online information.[106] Yet, these statements were in *obiter dicta* and were not relevant to deciding on the objections. Most panels remained cognisant that their authority does not extend to implementing safeguards concerning the operation of the gTLD registry; it is ICANN that has the authority to do so.[107]

5.2 Balancing the 'Market Approach' against the 'Social Approach'

The expert panels in the *Ruby Pike* and *Afilias* cases articulated the main issue in a different light altogether. The panels read their mandates broadly by invoking an argument *a contrario*: they contended that 'limiting the scope of procedure only to the name of the gTLD may render the entire objection procedure pointless'.[108] On this basis, the panels proceeded to act as guardians of the best interests of Internet users. According to this point of view, the health-related information that will be available online is reliant upon the *solely* commercial purpose of the Applicant. Hence, a balance must be struck between the Applicant's 'market approach' and a 'social approach', which protects human rights and, in particular, the right to health.[109] Since public and private entities have the duty to ensure the safety and welfare of Internet users, the Applicant is also under the obligation not to misuse the string .HOSPITAL and cause harm to society.[110] More specifically, the panels examined whether the Applicant had demonstrated an appropriate awareness of its duty to ensure that the gTLD is organised and managed in such a way as to promote health as a fundamental right established under international law.[111] For instance, the fact that the gTLD welcomes the registration of healthcare providers that are unrelated, in principle, to hospitals renders the available information unreliable and potentially harmful to internet users. Moreover, the absence in the gTLD application form of sufficient and adequate mechanisms guaranteeing access to safe information (such as a process by which unlawful, misleading or deceptive entries can be corrected) was a significant factor. The Applicant's commitment to establish channels of communications with national and international authorities with regard

[106] E.g. *Silver Glen* case, *supra* n. 32, para. 44.

[107] Ibid., para. 48; *Goose Fest* case, *supra* n. 32, paras. 109–110; *Dothealth* case, *supra* n. 32, paras. 106–107; *Steel Hill* case, *supra* n. 73, para. 50, para. 53.

[108] *Ruby Pike* case, *supra* n. 23, para. 71.

[109] Ibid., para. 72; *Afilias* case, *supra* n. 12, para. 59.

[110] *Ruby Pike* case, *supra* n. 23, para. 81.

[111] *Afilias* case, *supra* n. 12, para. 69.

to health-related standards and practices and to maintain health non-compliance hotlines was instrumental to the panels' conclusions.[112]

Nonetheless, the expert panels did not elaborate on the criteria to define the meaning of *untrustworthy* or *unreliable* information. Both terms are vague and are subject to different interpretations. ICANN, on the other hand, retains an extremely cautious approach towards introducing content-related limitations or filtering content online: it proclaims that it is neither the Internet's content police nor has it the expertise, experience or legitimacy to entertain such a task.[113] There is no doubt that accurate and reliable health-related information promotes patient participation and informed decision-making. From a legal point of view, however, one can find nothing in the panels' determinations on the precise content of accurate and reliable information, the causal link to substantiate the harm to Internet users or how to operationalise the standards of reliable and accurate information in the context of a domain registry.[114]

Turning to the final outcome, the Expert Panel in *Afilias* found that the Applicant expressly acknowledged its duty to manage the health gTLD in a responsible and safe manner[115] and that the respective commitments were responsive to health-related concerns.[116] *Ruby Pike* was the only case in which a Panel found in favour of the Objector and held that the .HOSPITAL string should not be registered.[117] It is worth remembering that the Panel in the *Ruby Pike* case was one of the few to hold that the right to health is an established general principle of international law and that it encompasses detailed obligations regarding access to reliable health-related information. In light of this far-reaching construction of the standard of general principles of international law for public order and morality it is not entirely surprising that the *Ruby Pike* case went so far as to read general interests of safety and the welfare of the society into this standard.

Overall, two main points should be underlined. First, the *Afilias* and *Ruby Pike* cases balanced the Applicant's 'market approach' against a 'social approach' favouring the health of Internet users. By framing the issue at hand in this way, the panels disregarded the fact that the gTLD strings are simultaneously a means for exercising freedom of communication and freedom of expression at the root of the Internet. gTLDs are Janus-faced—being the means both to pursue economic interests and to impart, seek and receive health-related information online. Therefore, imposing limits on the 'market approach' in light of health considerations equates with setting restrictions to online expression. The panels asserted that 'the Application falls outside the scope of freedom of expression',[118] without providing any pertinent explanation,[119] and despite the fact that the AGB dispute

[112] Ibid., para. 76.

[113] A.R. Grogan, 'ICANN Is Not the Internet Content Police' (12 June 2015), https://www.icann.org/news/blog/icann-is-not-the-internet-content-police. Accessed 1 March 2016.

[114] Eysenbach (2014).

[115] *Afilias* case, *supra* n. 12, para. 72.

[116] Ibid.

[117] *Ruby Pike* case, *supra* n. 23, para. 91.

[118] Ibid., para. 87.

[119] See Vezzani (2014), p. 331.

resolution principles (Article 3.5) specifically embed the creation of gTLDs into the protective scope of freedom of expression.

Second, the panels lack the authority to scrutinise and substantially assess the hypothetical impact of the operation of a string.[120] Even though one may criticise the Applicant's perception of health as a mere commodity, the fact remains that ICANN's registration requirements do not authorise a substantive content-wise check as a prerequisite for registering a gTLD string. This does not imply that there is no merit in discussing the serious interests at stake, but rather that the LPI objection procedure does not assign this role to the panels. As the dispute settlement procedure currently stands, the panels have a very restricted purview and 'it is not the task of an expert Panel to rewrite the application standards for gTLD strings and to supplement them with higher standards in the public interest'.[121] It is for ICANN to conduct an assessment of the likely effects of the creation of new gTLDs and to decide accordingly.[122] If ICANN were to revisit the aim of the LPI objection and/or expand the panels' competence, it could require the Applicants to submit more detailed commitments when applying for a string. The panels could then make a solid evaluation of the future management of the string and the respective adverse effects on the health of the Internet users.

5.3 The Human Rights Approach: Public Health as a Limitation to Freedom of Expression

The Expert Panel in the consolidated *Charleston Road*, *Hexap* and *Medistry* cases chose a different 'room' of international law from which to decide the objections. The Panel's starting point was the international human rights law perspective and, in particular, the freedom of expression. Notwithstanding that the AGB provides for limitations to free expression on such grounds as mentioned in the ICCPR, States' obligations under the right to health could be considered only as possible restrictions to the right to freedom of expression.[123] Framing the objection at hand under the human rights paradigm also means that the discussion takes place on a (mostly) State-centric basis. The panel did not consider it necessary to come to a definitive view on the extent to which, if any, non-State actors are bound by international human rights, but rather posited that the question of the right to health should be resolved by reference to its content.[124] The panel linked the human rights analysis to the LPI objection as follows. First, it held that States do not have any positive obligations to disseminate health-related information. Second, it found that the operation of the gTLD would not negatively affect the capacity of public authorities to fulfil their obligation to protect the right to health

[120] Dissenting Opinion by Reinisch, *supra* n. 31, para. 10.

[121] Ibid., para. 17.

[122] Also Vezzani (2014), p. 323.

[123] *Charleston Road* case, *supra* n. 73, para. 96.

[124] Ibid., para. 101; *Hexap SAS* case, *supra* n. 73, para. 110; *Medistry* case, *supra* n. 30, para. 106. This is a line of reasoning frequently encountered in the case law of the European Court of Human Rights.

since there is no duty to protect Internet users from the *risk* of misleading or unreliable information.[125]

In response to the Independent Objector's arguments on the human right to health, the Panel further noted that, from a human rights law perspective, public health, as a general public interest to be protected by the State, is analytically different to the human right to health. Public health as a legitimate aim to restrict freedom of expression has permissive rather than obligatory effects. Consequently, a State may, but it is not under the obligation to, restrict free expression in order to protect public health. Even if it is assumed that there is a point of convergence between public health and States' obligations under the right to health, any interference by public authorities will still have to be assessed as a proportionate and necessary restriction to freedom of expression.[126] Finally, an informational aspect of the right to health insofar as accessing reliable and trustworthy information is concerned does not automatically equate to a 'duty to censor all information that is not deemed reliable'.[127]

The human rights approach has its shortcomings. First, due to its State-centric focus there is not sufficient room to fully appreciate the multistakeholder particularities of Internet governance, including any human rights duties of the private sector. Second, the human rights paradigm sets a very high—almost impossible to attain—threshold for a string to be objectionable: the ground to object to an applied-for string must be an established general principle of international law on public order and morality *and* must qualify as a necessary restriction to freedom of expression. The AGB, other than stressing the exceptional nature of restrictions to the expressive function of gTLDs, does not clarify whether the necessity and proportionality test under human rights law should be met. It follows from this that the panels cannot act as human rights bodies. The objection should not be treated as a human rights dispute, unless one carefully tailors it to the specificities of the LPI objection procedure.

Third, however appealing the human rights approach might seem, it is not necessarily well placed to grasp and balance the competing interests in this instance. The human rights paradigm has been designed to acknowledge and remedy a harm that it has already occurred whereas the panels in the LPI objection procedure have to assess, and decide on, a hypothetical harm. The human rights analysis also focuses on a specific case of individual(s) whereas the panels need to determine public interests which have a global reach. Crucially, the only option for a Panel to appreciate the Independent Objector's arguments on the Internet users' right to health is to *reduce* this right to the public health restriction to freedom of expression.

To conclude, all but one of the Expert panels found that the applied-for strings were not contrary to general principles on public order and morality. Regardless of the final outcome, however, the panels decided the cases in distinctive ways. They

[125] *Charleston Road* case, *supra* n. 73, paras. 109, 111; *Hexap SAS* case, *supra* n. 73, paras. 118, 120; *Medistry* case, *supra* n. 30, paras. 114, 116.

[126] *Charleston Road* case, *supra* n. 73, paras. 100–103; *Hexap SAS* case, *supra* n. 73, paras. 109–112; *Medistry* case, *supra* n. 30, paras. 107–108.

[127] *Charleston Road* case, *supra* n. 73, para. 104; *Hexap SAS* case, *supra* n. 73, para. 113; *Medistry* case, *supra* n. 30, para. 109.

construed their mandates and prioritised the interests at hand differently. The panels in the *Steel Hill*, *Silver Glen*, *Goose Fest* and *Dothealth* cases approached the objections in a simple 'resolve the dispute' fashion without entertaining the particularities of the domain name space. The panels in the *Ruby Pike* and *Afilias* cases ignored their mandate under the AGB and acted as self-appointed guardians of the best interests of Internet users. Their starting point was the protection of the right to health and ensuring access to reliable and trustworthy information in an effort to counterbalance the 'market approach' of the gTLDs applicants. The panels went so far as to dismiss the applicability of the freedom of expression and explicitly to disregard the clear framework set up by the AGB dispute resolution principles. On the other side of the spectrum, the Panel in the consolidated *Charleston Road*, *Hexap* and *Medistry* cases embedded the objection into the human rights paradigm and applied a strict test in order to assess whether the right to health is a necessary limitation to freedom of expression. It is unclear whether the AGB warrants this test. That said, any ambiguity or obscurity contained in the AGB does not justify or explain these divergences. The fact that the panels framed and conceptualised the relationship between freedom of expression and the protection of public interests under different perspectives reflects the complexity in finding the 'right' approach for the DNS.

One could also highlight the endogenous challenge underpinning the balance of the incommensurable interests at hand, that is, on the one hand, the 'market' approach against the 'social' approach and, on the other, freedom of expression against public health. The incommensurability becomes apparent when discussing the availability of information on a global level and safeguarding public interest considerations for all Internet users. The panels, though, did not address either this issue or the appropriate analytical tools for duly appreciating and balancing in such cases.[128] In connection with this, one should not dismiss other tools and alternative ways for ensuring access to reliable health-related information outside the confines of the human rights paradigm or international legal reasoning. To take an example, there is merit in the idea of discussing source quality instead of content quality. In this way, one does not need to discuss content restrictions to gTLDs in the name of protecting the public interest of health. If the goal is to make the health-related domains a trusted space, then principles of source credibility can be implemented, and transparency mechanisms can allow consumers and Internet users themselves to assess the trustworthiness of the source. A gTLD can be managed in accordance with high standards of accessing reliable health-related information without hindering freedom of speech. Source credibility can be achieved when the registrar requires specific credentials or criteria to be met from the prospective second-level domain owners (for example, certification, professional licences) and/or when the registrar ensures that site owners are transparent in disclosing their financial interests, their credentials and privacy protection mechanisms.[129]

It needs to be underscored, however, that it is unreasonable to place the burden of resolving the domain name space problems on the panels notwithstanding their

[128] Endicott (2012); Fontanelli (2015).

[129] Eysenbach (2014).

restricted competence.[130] The international multistakeholder community, including ICANN, needs to find a consensus on the grounds that freedom of information on the domain level should be limited. To give another example from international practice, the Committee of Ministers of the Council of Europe in a recent Declaration underlines that any restrictions placed on the registration and operation of the strings must be in line with the limitations to freedom of expression.[131] At the same time, the Declaration stresses that ICANN should ensure that, when defining access to the use of TLDs, an appropriate balance is struck between economic interests and other objectives of common interest, including pluralism, cultural and linguistic diversity and respect for the special needs of vulnerable groups and communities.[132] Do these objectives of common interest sit well within the exhaustively prescribed grounds for limiting the freedom of expression? Pluralism, cultural and linguistic diversity and respect for the special needs of vulnerable groups do not appear to fall under the ambit of the exhaustively provided legitimate aims for restricting freedom of expression under Article 19(3) ICCPR (the protection of national security or of public order, or of public health or morals, or the protection of the rights or reputations of others).[133] The same question equally applies to the lengthier list of legitimate aims under Article 10(2) ECHR.[134]

6 Conclusions

The standard of general principles of international law for public order and morality sits well with the interests of the drafters of the LPI objection. The AGB strongly indicates that the scope of the LPI objection is to be construed narrowly and only a limited set of particularly reprehensible applied-for strings will be objectionable. Although the AGB standard is conducive to encapsulating norms of public order and morality, this does not entail that the AGB standard can bring into play many global public interest concerns as grounds to object to applied-for strings. For such grounds to be valid they need, first, to qualify as a general principle of international law for public order and morality and, second, a legitimate restriction to freedom of expression. Therefore, reliable and trustworthy access to health-related information or other interests concerning pluralism, cultural and linguistic diversity and respect

[130] See Vezzani's criticism (2014), p. 331.

[131] Council of Europe, Declaration of the Committee of Ministers on ICANN, Human Rights and the Rule of Law (3 June 2015) para. 4, https://wcd.coe.int/ViewDoc.jsp?Ref=Decl(03.06.2015)2&Language=lanEnglish&Ver=original&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383. Accessed 1 March 2016.

[132] Ibid.

[133] A report published by the Council of Europe suggests different grounds for limiting gTLDs, including 'racial hatred, supporting terrorism, vehemently attacking religions, inciting to violence, negating the Holocaust or calling for installing totalitarian regimes'. See Benedek and Kettemann (2013), p. 95.

[134] Art. 10(2) ECHR refers to interests of national security; territorial integrity or public safety; prevention of disorder or crime; protection of health or morals; protection of the reputation or the rights of others; preventing the disclosure of information received in confidence; maintaining the authority and impartiality of the judiciary.

for the special needs of vulnerable groups do not appear to meet the high threshold for a string to be objectionable.

The great majority of the expert panels acknowledged that their mandate under the LPI objection procedure is very restricted since the assessment of the registrability of an applied-for string must take place primarily on the basis of the string itself. For this reason, the Expert panels did not entertain the substantive discussion on the protection of health online and access to reliable health-related information.

Establishing the international quality and content of a general principle of international law on public order and morality is a difficult exercise. In the instances discussed, the panels reached different conclusions as to whether the right to health of internet users is a general principle. Many panels evaded the question altogether whereas other panels affirmed the existence of such a principle—albeit on the basis of poor reasoning.

Many of the expert panels decided on the objections by prioritising different interests under international law and, hence, by adopting different standpoints. This practice evidences an implicit effort to apply distinct international law 'mindsets' to aspects of the domain namespace. In this way, some panels prioritised the expressive function of the gTLDs whereas other panels set as their starting point the need to value reliable and trustworthy information online *vis-à-vis* the market interests of the registries. Nonetheless, transposing existing paradigms and concepts of international law—such as the human rights paradigm or the 'social rights' perspective—is inapt both from an international law and from the domain name space point of view. More discussion is needed on the international law's potential for, and the limitations to, regulating critical aspects of the domain name space.

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